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The argument being made today for giving the tobacco industry what it wants in the proposed national tobacco legislation is that this compromise is necessary to secure tobacco advertising restrictions that would otherwise be unconstitutional. This argument is incorrect for five separate and independent reasons. Briefly, first, many of the proposed restrictions are already being imposed under state-by-state settlements. Second, Congress has the power to impose these restrictions without the industry's permission. Third, the view that the advertising restrictions will not be attacked because of the industry concession that it will not challenge the restrictions is a mirage because of the availability of numerous other parties (advertising agencies, billboard companies, convenience stores) to challenge the statute. Fourth, it is unconscionable, but not unexpected, that the tobacco industry has taken the negotiating stance of a kidnapper: "We have your children and if you don't want us to addict them you need to provide us with immunity." And fifth, if the industry is right in asserting that the proposed restrictions violate its First Amendment rights, under the well established doctrine of "unconstitutional conditions" Congress could not condition the grant of immunity which the industry seeks on its "voluntary" waiver of its alleged constitutional rights.

Specifically, several of the advertising restrictions included in the proposed global settlement have already been achieved in the settlement of the state lawsuits in Mississippi, Florida and Texas. Florida's settlement included the elimination of billboard and transit advertisements of tobacco products. Also, the tobacco industry will pay $200 million for a counter-advertising and educational program in Florida alone. These provisions were strengthened in the Texas settlement and will undoubtedly be incorporated in future state settlements. Furthermore, any additional restrictions negotiated as part of future settlements are automatically included retroactively in the earlier settlements through the operation of the "Most Favored Nation" clauses contained in each of these settlements. Importantly, these state negotiated agreements are not subject to the "unconstitutional conditions" doctrine.

The advertising restrictions incorporated in the proposed settlement are constitutional. In fact, a more far-reaching restriction would also be constitutional. Thus, limiting all tobacco advertising to the aptly named "tombstone" format (black text on a white background) is a reasonable solution to this problem and has well established precedent. Since the 1930s, federal securities law has required that a company use a tombstone format when advertising shares of the company. If Congress can limit securities offerors to tombstone advertising to protect people's pocketbooks, then surely it can similarly limit tobacco company advertising to protect people's lives and health.

Furthermore, existing First Amendment jurisprudence regarding the regulation of commercial speech allows the government to restrict tobacco advertising without violating the Constitution. Congress can craft a law that directly and materially advances the substantial government interest in protecting the health of its citizens without regulating more speech than necessary. At a time when 3,000 of our children are starting to smoke every day and 1,000 of them will die prematurely, Congress must act to blunt the enticement of those children to experiment with this deadly and addictive drug. This would be true even if the enticement was unintended by the tobacco advertisers; it is especially true where the advertisers have been caught red-handed deliberately targeting minors.

Congress can also restrict tobacco advertising in the exercise of its normal consumer protection powers to preserve "a fair bargaining process" See 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1506 (1996). The advertising practices of this industry have created a huge imbalance in bargaining power between the industry and its consumers. The tobacco industry targets consumers that are either underage or have become physically and psychologically dependent on the product. As recently disclosed internal industry documents show, the industry deliberately recruited young teenagers with the intent and effect of creating life-long addicted customers. In addition, advertising images also provide subconscious cues to reinforce addictive behavior. Governments have the ability to protect consumers from such predatory behavior. Thus the proposed regulation of commercial speech has an economic as well as a public health underpinning.

The First Amendment to the United States Constitution guarantees the right to freedom of speech, but this right has never been an absolute right to say anything, anywhere, on any topic. Tobacco advertising can be regulated but the regulations must conform to the four-part commercial speech test set forth by the Supreme Court in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 328 (1980). First, the speech must qualify for Constitutional protection (e.g. cannot be obscene or fraudulent). Second, the restriction must further a substantial state interest. Third, the restriction must directly advance the government interest. Fourth, there must be a reasonable fit between the method chosen and the state interest. It need not be the least restrictive alternative, but it must be "sufficiently tailored to its goal." Rubin v. Coors Brewing Co., 115 S.Ct. 1585, 1593 (1995).

It is not clear that most forms of cigarette advertisements would pass even the first basic test of Central Hudson as to whether it is constitutionally protected speech. There is no constitutional speech protection for proposing illegal transactions such as sales of cigarettes to minors. There is no constitutional protection to engage in fraud by suggesting that smoking is a healthful behavior engaged in by young healthy models. Liggett has admitted that the entire tobacco industry conspired to market cigarettes to children and documents obtained in litigation from the other tobacco companies and recently made public confirms that tobacco companies purposefully marketed to children as young as 12 years old.

Protecting the public health is, of course, a substantial state interest thus satisfying the second prong of the Central Hudson test. The interest in protecting children from lifetime addiction and early death is not only substantial, but overwhelming. Even the tobacco industry concedes this point.

The third prong of Central Hudson requires that the method chosen by the government advance the government interest. There is not yet clear direction from the Supreme Court as to what level of evidence is required to show that the method directly advances the interest. The Court is beginning to demand some scientific or statistical evidence to show that the chosen method will work. In Florida Bar v. Went-For-It, Inc., 115 S.Ct. 2371 (1995), the Court was satisfied with a general assertion by the state that common sense dictated that restricting direct mail attorney advertising would reduce attorney ethical violations and have a positive effect on the public's opinion of attorneys. Limited social science evidence was presented, yet the restriction was upheld. In 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996) Justice Stevens suggested that one reason the Rhode Island statute was struck down was because the state had not produced evidence that its speech restriction would directly and materially produce the desired results. Indeed, it's hard to read 44 Liquormart without concluding that the speech restriction there had little or nothing to do with the asserted state interest of reducing liquor consumption.

No matter which approach is used to scrutinize the proposed restrictions, tobacco advertising restrictions will still satisfy the third prong of Central Hudson. There is extensive social science research regarding the effect of tobacco advertising on the purchasing habits of teen smokers and on the positive imagery with which children regard and recognize tobacco advertising images. Just last month, researchers demonstrated a strong link between tobacco promotion and the decision by adolescents to begin to smoke, Pierce, et al., Tobacco Industry Promotion of Cigarettes and Adolescent Smoking, 279 JAMA 511 (1998), and that brands popular among young adolescents advertise more heavily in magazines with high youth readership. King, et al., Adolescent Exposure to Cigarette Advertising in Magazines, 279 JAMA 516 (1998). Also, six year olds recognize Joe Camel as readily as Mickey Mouse. Fischer, et al., Brand Logo Recognition by Children Aged 3 to 6 Years Old: Mickey Mouse and Old Joe the Camel, 266 JAMA 3145 (1991). They also know Old Joe is associated with cigarettes. After the introduction of the Joe Camel ad campaign in the late 1980s the market share of Camel cigarettes in the teen market increased at least 20-fold, and the previous decline in teenage smoking was reversed. Changes in the Cigarette Brand Preferences of Adolescent Smokers - United States, 1989-1993, 272 JAMA 843 (1994). The rise in young girls smoking habits after the tobacco industry decided to go after girls as a target market has also been documented. Pierce, et al., Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association With Targeted Advertising, 271 JAMA 608 (1994).

While advertising restrictions, either by themselves or in combination with other tobacco control measures, will not completely solve the teenage nicotine problem, they will certainly directly and materially contribute toward reducing teenage tobacco use.

Thus, to use an extraordinarily conservative assumption, even if only one percent of teenagers who currently take up smoking would not do so as a result of advertising restrictions, that would amount to about 10,000 fewer kids hooked on tobacco each year - and at least 3,000 fewer premature deaths each year**.** That is clearly material.

Legislation may be crafted to meet the fourth prong of Central Hudson regarding tailoring the requirement to be no more restrictive than necessary. The Supreme Court has made it clear that this standard is not to be confused with the "least restrictive means" test. In U.S. v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993), the Supreme Court said that the "requirement of narrow tailoring is met if the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation, provided that it did not burden substantially more speech than necessary to further the government's legitimate interests." The existence of less restrictive methods of achieving the government's goals does not automatically defeat the legislation as it would in political speech cases. Instead the Court looks to see if the restriction does not sweep more broadly than necessary. In Florida Bar v. Went For It, Inc., 115 S.Ct. at 2380, the court stated "In Fox, we made clear that the 'least restrictive means' test has no role in the commercial speech context . . . 'What our decisions require instead is a fit between the legislature's ends and the means chosen to accomplish those ends', a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served', that employs not necessarily the least restrictive means, but . . . a means narrowly tailored to achieve the desired result." (internal citations omitted).

Tobacco advertising legislation will not be a total ban and the tobacco industry will still have many alternative channels to communicate with its adult customers. Adults will still receive information on price, quality, comparative product features and any other information to help them make an informed decision on tobacco products. Even if they were limited to communicating in tombstone format, the government would not have prohibited the flow of information. Furthermore, other less restrictive alternatives, such as price increases and access restrictions, have been tried and have not solved the problem of teen tobacco use.

Furthermore, Reno v. ACLU (the "indecency" on the Internet case) is not an appropriate analogy because the statute in that case, the Communications Decency Act, restricted political speech which is at the core of our value system. Statutes restricting political speech receive the strictest scrutiny from the courts. Commercial speech receives much less protection. The statute in Reno was also struck down as being too vague in its description of "indecency". No such problem would arise under the proposed tobacco advertising statute if tombstone advertising restrictions were enacted.

44 Liquormart does not change this analysis. In 44 Liquormart, Rhode Island placed a ban in all media on advertising providing price information on liquor products so as to drive down consumption. The Court saw the Rhode Island statute as a paternalistic complete ban in all media on the free flow of truthful information. That rationale does not

apply here because the proposed tobacco legislation would not be a complete ban, nor would it occur in all media. The tobacco industry would still have many avenues of communication open to it, and could communicate all aspects of information albeit in tombstone format.

In addition, keeping this out of court is a mirage. There is no basis for the belief that the legislation will not be challenged by the industry's promise that it will not attack the constitutionality of the tobacco advertising restrictions. Many surrogates, such as advertising agencies, billboard companies and convenience stores, could challenge the restrictions as a violation of their own First Amendment rights. For example, a convenience store could challenge the prohibition of a "non-complying" window advertisement for Camel cigarettes. If successful, the surrogate's challenge could result in the entire section being struck down.

Finally, the extensive involvement of Congress (including today's hearing) in the supposedly "private" and "voluntary" agreement by the industry to "waive" what it asserts to be its First Amendment rights will make it hard later to argue with a straight face that the restrictions imposed by the agreement are not "state action". The tobacco industry does not have the claimed First Amendment rights, but if it did, Congress could not condition the grant of immunity from civil liability which the industry seeks upon the industry's surrender of its alleged rights. As Justice Stevens stated in 44 Liquormart, "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." 44 Liquormart, 116 S.Ct. at 1507.

In sum, Congress has the power to directly regulate the tobacco industry's commercial advertising. Getting the industry's permission will not help one whit, because the industry can later claim Congress unconstitutionally conditioned the receipt of the benefit of immunity on the relinquishment of its alleged rights. Today the industry may shake your hand, but tomorrow it will claim you twisted its arm.

An appropriate method for achieving public health goals would be to confirm the administrative power of the United States Food and Drug Administration to regulate nicotine as it would any other drug. The FDA provides a mechanism for change in this on-going health crisis whereas Congress is unlikely to revisit this issue any time soon. The need for administrative responsiveness, though cumbersome, is crucial as the tobacco industry is likely to discover legislative loopholes which the FDA must have the flexibility to close. Congress does not have the ability or desire to micromanage this issue.

If Congress wants to take action in this field, and it should, it might as well proceed in the normal constitutional manner - by passing a statute. And nowhere in the Constitution is there any requirement that the tobacco industry consent to being regulated.